92-1414

Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY N. TJOSSEM AND MARILYN E. TJOSSEM,
Petitioners,
v.
COMMISSIONER OF INTERNAL REVENUE SERVICES, ET AL,
Respondents.

Petition for A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

L. T. BRADT
6303 Feldspar
Houston, TX. 77092-4716
(713) 681-2696-Phone
(713) 688-8212-FAX

Counsel for Petitioner

Alpha Law Brief Co. • 6113 Aletha Lane • Houston, Texas 77081 (713)981-9000

QUESTIONS PRESENTED

(1) Does diversion of the mail by the United States Postal Service negate the presumptive effect of mailing a Notice of Deficiency to a taxpayer's last known address by the Commissioner of Internal Revenue?

(2) Does it violate Due Process and Equal Protection of the law if a taxpayer is charged with a Notice of Deficiency which is diverted by the United States Postal Service and/or stolen from the United States Postal Service and is never delivered to the tax payer?

(3) Is a taxpayer chargeable with notice of a Notice of Deficiency sent to his "last known address" when the Notice of Deficiency is misdirected by the United States Postal Service?

(4) Is a taxpayer chargeable with notice of a Notice of Deficiency when the Notice of Deficiency is stolen from the United States Postal Service?

(5) Does theft of a Notice of Deficiency from the United States Postal Service destroy the notice which would otherwise be imputable to the taxpayer upon the mailing of the Notice of Deficiency to the taxpayer's "last known address?"

PARTIES

Petitioners-Appellants in this case are Gary N. Tjossem and wife, Marilyn E. Tjossem.

Respondents-Appellees in this case are the Commissioner of Internal Revenue, the Internal Revenue Service and the United States of America.

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NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

GARY N. TJOSSEM and MARILYN E. TJOSSEM,
Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE SERVICE, ET AL,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

To The Honorable Chief Justice of the United States, and to the Associate Justices of the United States Supreme Court:

Petitioners, Gary N. Tjossem and wife, Marilyn E. Tjossem (hereinafter "Petitioners") respectfully pray that a Writ of Certiorari issue to review the decision of the United States Court of Appeals for the Fifth Circuit, which sustained an order of the United States Tax Court dismissing Petitioners suit for lack of jurisdiction and denying their motion to dismiss for lack of jurisdiction against the Commissioner of Internal Revenue (hereinafter "I.R.S.").

REPORTS OF OPINIONS

The opinion of the Fifth Circuit Court of Appeals in this case is not reported and is set forth in Appendix D.

The Opinion of the United States Tax Court is reported at 1991 T. C. Memo 626 and is set forth in Appendix B B.

The Order of the United States Tax Court is not reported and is set forth in Appendix A.

JURISDICTION

The decision sought to be reviewed herein was entered by the United States Court of Appeals for the Fifth Circuit on October 30, 1992 and is set forth at Appendix D. An order denying a rehearing was entered by the Court of Appeals on December 1, 1992. That order is set forth in Appendix C.

The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1).

STATUTES INVOLVED

The following statutes are involved in this case:

18 U.S.C. Sections 1702 and 1708. These are set forth in Appendices E and F.

26 U.S.C. (Internal Revenue Code of 1954, as amended) Sections 6212(b)(1) and 6213(a). These are set forth in Appendices G and H.

The following Constitutional provision is involved in this case:

Fifth Amendment of the United States Constitution. This is set forth in Appendix I.

STATEMENT OF THE CASE

This case involves the Due Process and Equal Protection considerations entailed in the mailing of a Notice of Deficiency by the Internal Revenue Service (hereinafter I.R.S.) which is both misdirected by the United States Postal Service, and is in fact stolen as defined by Title 18 U.S.C. Sections 1702 and 1708.

STATEMENT OF FACTS

On February 2, 1990, Respondent issued a Notice of Deficiency to Petitioners for the tax years ended December 31, 1986 and December 31, 1987, respectively. (Attachments to Petition, Document No. 2). That Notice of Deficiency was addressed to Petitioners at 6131 Coral Ridge, Houston, Texas 77069, which address was Petitioners' last known address. (Supplemental Stipulation of Facts - Document No. 17). The Notice of Deficiency was delivered by the United States Postal Service to Mr. R. O. Brenner at 6134 Coral Ridge, Houston, Texas. (Transcript Page 6, Line 3 - 24; Stipulation of Facts, Item 9 and Joint Exhibit 5-E, Document No. 15). Petitioners never authorized Mr. Brenner to receive mail for them nor did they authorize the United States Postal Service to deliver mail addressed to them to Mr. Brenner. (Transcript Page 6, Lines 3 - 24; Page 8, Lines 16 - 19). Petitioners never received the Notice of Deficiency that Mr. Brenner signed for. (Transcript Page 9, Lines 14-16)

Petitioners first learned of the issuance of the Notice of Deficiency upon receiving a Notice of Tax Due (Transcript Page 9, Line 17 - Page 10, Line 3). This date was more than 90 days after the issuance of the Notice of Deficiency. Thereafter, the Petitioners filed their petition with the United States Tax Court.

The Commissioner moved to dismiss for lack of jurisdiction as the Petitioners petition was not filed within 90 days of the issuance of the Notice of Deficiency. Petitioners cross moved to dismiss for lack of jurisdiction. The Tax Court, following a hearing, granted the Commissioner's Motion to Dismiss and dismissed the case for lack of jurisdiction, while denying Petitioners' cross motion to dismiss.

The Fifth Circuit Court of Appeals affirmed the Tax Court's decision and this appeal results.

ARGUMENT

Reasons for granting the Writ.

This case is ripe for Supreme Court review to resolve a sharp split in the Circuit Courts of Appeals on the interpretation of an important Federal statute relating to the validity of a Notice of Deficiency which is diverted by the United States Postal Service. The statutory framework in question has a substantial impact on the power of the I.R.S. to determine deficiencies and deny tax payers the ability to contest those determinations. This Court has yet to rule on the issues presented by this case, and its guidance is required to resolve a difficult question on the interpretation of a statute which has a direct and meaningful impact on a significant segment of the public.

Statutory framework.

The Internal Revenue Code of 1954, 26 U.S.C. (hereinafter the "Code") Section 6212(b)(1) authorizes the I.R.S. to mail a Notice of Deficiency to the tax payer at his "last known address." The Notice of Deficiency with respect to income tax is deemed "sufficient" if it is mailed to his "last known address". The tax payer then has a period of 90 days from the mailing of this deficiency notice in which to file a petition with the Tax Court seeking a redetermination of the deficiency. 26 U.S.C. Section 6213(a).

The split in the Circuits.

The Circuit Courts of Appeals disagree on the application of the effect on the validity or sufficiency of the Notice of Deficiency when same is diverted by the Postal Service. The Seventh Circuit has ruled:

> "When evidence indicates that a Notice of Deficiency has not been received by the tax payer due to error of the Postal Service, the notice shall be found insufficient."

McPartlin v. Commissioner, 653 F. 2d 1185, 1191 (7th Circuit 1981). The Fourth Circuit has similarly ruled:

> "... a Notice of Deficiency not received by the tax payers due to an error of the Postal Service is insufficient."

Powell v. Commissioner, 958 F. 2d 53, 56 (4th Circuit 1992).

The Fifth Circuit has ruled directly contrary to **McPartlin** and **Powell supra** and the United States Tax

Court [**Estate of McKaig v. Commissioner**, 51 T.C. 331 (1968)] on whether diversion of the Notice of Deficiency by the Postal Service vitiates the sufficiency of same. **Jones v. United States**, 889 F.2d 1448 (5th Circuit 1989); **Keado v. United States**, 853 F.2d 1209 (5th Circuit 1988); **McCarty v. United States**, 929 F.2d 1085 (5th Circuit 1991). The Second Circuit appears to line up with the Fifth Circuit on this question in light of its decision in **Tadros v. Commissioner**, 763 F.2d 89 (2nd Circuit 1985).

Great conflict exists between the Circuits in the application of the effect of the diversion of the Notice of Deficiency by the Postal Service. The Fourth and Seventh Circuits recognize that the presumption of receipt is overcome by a showing of a diversion of the mail by the United States Postal Service. The Fifth Circuit charges the tax payer with presumptive receipt of the Notice of Deficiency even when same is diverted by the Postal Service. Given the importance of the statute and the Due Process considerations involved, it is submitted that certiorari should be granted on this ground alone.

Due Process considerations.

The process of mailing of the Notice of Deficiency to the taxpayer's last known address and the presumption of receipt (and notice) which arises therefrom must be balanced against the Petitioners' Due Process rights under the Fifth Amendment to the United States Constitution.

> Procedural due process imposes constraints on governmental actions which deprive individuals of "liberty" or "property" interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment. * * *
> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures

> used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirements would entail.

Mathews v. Eldridge, 424 U.S. 319, 332, 335, 96 S.Ct. 893, 901, 903, 47 L.Ed.2d 18 (1976).

Eldridge requires courts to "balance the governmental interest in [retaining] the existing process against the private interest that will be affected and the probability of erroneous deprivation associated with that process. Obviously the damage to Petitioners through misdelivery of the mail is great. The Fifth Circuit and the Tax Court were therefore bound to apply the **Eldridge** test to Petitioners' claim of denial of Due Process through the misdelivery of the Notice of Deficiency.

Internal Revenue Code Provisions.

Title 26 U.S.C. Section 6212 provides the statutory framework for the Commissioner to mail a Notice of Deficiency to the taxpayer, specifically authorizing the Secretary to "... send notice of such deficiency by certified or registered mail."

The reason Congress enacted Section 6212 --

> . . . the Congress, when it "authorized" service by registered [or certified] mail, did not intend to require actual receipt by the addressee of the letter. Rather, it permitted the use of a method of giving notice that would ordinarily result in such receipt. **Cohen v. United States**, 297 F.2d 760, 772 (9th Cir. 1962), **cert. denied**, 369 U.S. 865, 82 S.Ct. 1029, 8 L.Ed.2d 84 (1962). The statutory scheme, therefore, provides a method of notification which insures that

> the vast majority of taxpayers will be informed that a tax deficiency has been determined against them without imposing on the Commissioner the virtually impossible task of proving that the notice actually has been received by the taxpayer.

Jones v. United States, 889 F.2d 1448, 1450 (5th Cir. 1989).

Part of this purpose is served by the presumption that "a properly-addressed piece of mail placed in the care of the Postal Service has been delivered." **Mulder v. Commissioner**, 855 F.2d 208, 212 (5th Cir. 1988), rehearing denied, 861 F.2d 1333. However, that presumption may be rebutted by testimony of non-receipt. **In re Yoder Co.**, 758 F.2d 1114 (6th Cir. 1985); **Doolin v. United States**, 918 F.2d 15 (5th Cir. 1990).

It is the presumption of receipt that has satisfied the Due Process considerations entailed in notification of the tax payer of a deficiency in income tax. Congress has thus balanced the tax payer's common law right to actual notice before a deficiency is determined with a lessened burden on the Commissioner without requiring actual proof of receipt of a Notice of Deficiency by each tax payer to whom one is mailed. However, this substitution cannot be less than the Notice that is required by the Due Process clause of the United States Constitution.

It is the presumption of receipt of mail which has allowed courts to rule against taxpayers who have denied receipt of the Notices of Deficiency when there has not been any actual proof of mis-delivery by the Postal Service.

The Tax Court originally set forth the correct proposition regarding the taxpayer's responsibility when the Postal

Service diverts the mailing of the Notice of Deficiency.

> Even assuming that the Cedar Street address was petitioner's "last known address" to respondent, **the Post Office Department changed that address before it was delivered and presumably this caused the delivery failure.** That statute says the notice of deficiency must be mailed to the last-known address. **We do not think this mailing can be said to have been completed within the meaning of the statute because the Post Office Department diverted it. Petitioner cannot be held responsible for this.**

Estate of Francis P. McKaig, Jr., 51 T.C. 331, 336 (1968) [Bold emphasis supplied].

The Tax Court reaffirmed its position and provided guidance in this case when it stated:

> Where the notice is sent to the wrong address and never delivered, or delivered with prejudicial delay, the statutory purpose is not served, and it would be manifestly unfair to deny the taxpayer his prepayment hearing.

Mulvania v. Commissioner, 81 T.C. 65, 70 (1983).

Petitioners acknowledge that in cases where delivery of the Notice of Deficiency was attempted by the Postal Service, but the letter was either refused or not called for after a notice of attempted delivery was ignored, the taxpayer has lost. Such is not the situation which exists here. Further, this is not a case wherein the Petitioners deny receipt of the letter and the Respondent is unable to produce evidence of what happened to the letter after mailing. (e.g. **Jones v. United States**, 889 F.2d 1448 (5th Cir. 1989)) We

know exactly what happened to the Notice of Deficiency in this case - it was delivered by the Postal Service to the wrong person at the wrong address!

Petitioners would have received the Notice if the Post Office had complied with its duty to deliver to them the mail addressed to Petitioners.

Indeed, in analogous situations, the District Courts have on at least two occasions held that the taxpayer cannot be held responsible for diversion of the mailing by the Postal Service. **Kennedy v. United States**, 403 F. Supp. 619 (W.D. Michigan, 1975), aff'd mem. 556 F.2d 581 (6th Cir. 1977); **Tangren v. Mihlbachler**, 522 F. Supp. 701, 703 (D. Colorado, 1981).

Theft of mail.

Equally important and what makes this a case of first impression is the proof in the record of both the Postal Service's breach of its duty to deliver the mail, coupled with the theft of that mail after the mis-delivery.

> The Postal Service has a duty to deliver postal matter to the address indicated by the sender. When it satisfies this obligation and the material is received at that address, its concomitant authority over the mail ends. Conversely, when the Postal Service misdelivers an item, thus breaching its duty, its authority continues after the item is received.

United States v. Anton, 547 F.2d 493, 495 (9th Cir. 1976); accord, **United States v. Davis**, 461 F.2d 83 (5th Cir. 1972).

Title 18 U.S.C. Sections 1702 and 1708 make it a felony to take, divert, or otherwise cause the misdelivery of mail. R.O. Brenner thus committed a felony offense in accepting, without the Petitioners' consent, the Notice of Deficiency in this case from the Postal Service. The Postal Service clearly breached its duty to deliver Petitioners' mail properly, by delivering it to the wrong address and to the wrong person. Petitioners could hardly be charged with the felonious conduct of persons with whom they are not associated. To the contrary! To hold otherwise would violate the clear congressional intent of both requiring the Postal Service to deliver mail as it is addressed and requiring the Secretary to mail the Notice of Deficiency to the taxpayer's last known address.

The Fifth Circuit's decision in this case therefore deprives the Petitioners of their entitlement to notice of the deficiency and the opportunity to contest same in Tax Court without providing the Petitioners the equivalent notice required by the Due Process Clause of the United States Constitution.

CONCLUSION

For all of the foregoing reasons, this Petition should be granted and a Writ of Certiorari should be issued to review the decision below.

Respectfully Submitted

L. T. Bradt
6303 Feldspar
Houston, TX 77092-4716
(713) 681-2696 - Phone
(713) 688-8212 - FAX

APPENDIX A

UNITED STATES TAX COURT
WASHINGTON, D.C. 20217

GARY N. TJOSSEM AND MARILYN E. TJOSSEM,	}	
Petitioners,	}	Docket No. 7747-91
v.	}	
COMMISSIONER OF INTERNAL REVENUE,	}	
Respondent.	}	

ORDER AND ORDER OF DISMISSAL FOR LACK OF JURISDICTION

Pursuant to the Court's Memorandum Findings of Fact and Opinion, T.C. Memo. 1991-626, it is

ORDERED that petitioners' Motion To Dismiss For Lack Of Jurisdiction, filed July 15, 1991, is denied. It is further

ORDERED that respondent's Motion To Dismiss For Lack Of Jurisdiction, filed June 18, 1991, is granted that this case is dismissed for lack of jurisdiction.

/s/ John O. Colvin
John O. Colvin
Judge

Entered: DEC 19 1991

DEC 23 1991

APPENDIX B

T.C. MEMO. 1991-626

UNITED STATES TAX COURT

GARY N. TJOSSEM AND MARILYN E. TJOSSEM, Petitioners *v.* COMMISSIONER OF INTERNAL REVENUE, Respondent

Docket No. 7747-91 Filed December 17, 1991.

Leonard Thomas Bradt, for the petitioners.

Cheryl M.D. Rees, for the respondent.

MEMORANDUM FINDINGS OF FACT AND OPINION

COLVIN, *Judge*: This case is before the Court on respondent's motion to dismiss for lack of jurisdiction and petitioners' cross-motion to dismiss for lack of jurisdiction. The sole issue is whether a notice of deficiency properly mailed by respondent to petitioners' "last known address" is rendered invalid because the notice was delivered by the Postal Service to a neighbor of petitioners.

Respondent determined deficiencies in petitioners' Federal income tax for the taxable years 1986 and 1987 in amounts of $12,296 and $18,873, respectively. Respondent also determined additions to tax for the tax years 1986 and 1987 in the amounts of $615 and $944, respectively, under section 6653(a)(1)(A); amounts to be determined under section 6621(c); and amounts of $3,074 and $4,718, respectively, under section 6661.

All section references are to the Internal Revenue Code. All Rule references are to the Tax Court Rules of Practice and Procedure.

FINDING OF FACT

Some of the facts have been stipulated and are so found.

Petitioners resided in Houston, Texas, when their petition was filed. Reference to petitioner in the singular is to Mr. Gary Tjossem.

At all times relevant to this case, petitioners' address was 6131 Coral Ridge, Houston, Texas 77069.

Petitioner frequently travels away from home, and his wife occasionally accompanies him. When petitioners are away from home, they usually let the mail accumulate in their mailbox and come home periodically to collect it. There have been times when petitioners made arrangements for someone to pick up the mail, but they normally do not do this. Petitioners never authorized or asked Mr. R. O. Brenner to receive mail for them.

On February 2, 1990, respondent mailed by certified mail the notice of deficiency dated February 2, 1990, to petitioners at 6131 Coral Ridge, Houston, Texas 77069. The parties agree that the notice of deficiency was mailed to petitioners' last known address.

Postal Service Form 3849-A, the Delivery Notice or Receipt, evidencing delivery of the notice of deficiency, was received and signed for by Mr. R.O. Brenner, who lived across the street from petitioners at 6134 Coral Ridge, Houston, Texas 77069. Mr. Brenner is now deceased.

Petitioner testified, as we discuss further below, that petitioners did not receive the notice of deficiency that was signed for and received by Mr. Brenner.

On September 17, 1990, petitioner wrote to respondent regarding petitioner's receipt of notices of changes resulting from an examination of his 1986 and 1987 returns. Petitioner indicated that he was not in agreement with the proposed changes. Petitioner's letter did not attach the notice of changes or state when he received it. On December 18, 1990, petitioners wrote to respondent and enclosed copies of two requests for payment dated September 17, 1990. that they had received for 1986 and 1987. Petitioners stated they had no record of having received a 90-day letter, and they requested a copy of it and any record of delivery to them.

The petition in this case was filed on April 26, 1991. Respondent moved to dismiss for lack of jurisdiction on the ground that the petition was untimely. Petitioners filed a cross-motion to dismiss for lack of jurisdiction on the ground that the notice was invalid. A hearing was held at Houston, Texas, on October 28, 1991.

OPINION

To maintain an action in this Court, there must be a valid notice of deficiency and a timely petition. *Monge v. Commissioner*, 93 T.C. 22, 27 (1989); *Pyo v. Commissioner*, 83 T.C. 626, 632 (1984). If respondent issued a valid notice of deficiency, the petition must be dismissed for lack of jurisdiction as untimely. However, if jurisdiction is lacking because of respondent's failure to issue a valid notice of deficiency, we will dismiss the case on that ground. *Pietanza v. Commissioner*, 92 T.C. 729, 735-736 (1989), affd. without published opinion 935 F.2d 1282 (3rd Cir. 1991).

Petitioners were required to file their petition within 90 days after the notice of deficiency was mailed. Sec. 6213(a). The requirements for issuing a valid notice of deficiency are set forth in section 6212. Under section 6212(a), respondent is authorized to send a notice of deficiency to a taxpayer by certified or registered mail. It is well settled that a notice of deficiency is valid even if it is not received. *Tadros v. Commissioner*, 763 F.2d 89, 91 (2d Cir. 1985); *Luhring v. Glotzbach*, 304 F.2d 556, 558 (4th Cir. 1962); *Zenco Engineering Corp. v. Commissioner*, 75 T.C. 318, 321-322 (1980), affd. without published opinion 673 F.2d 1332 (7th Cir. 1981). Congress did not require actual notice. Rather, it permitted the use of a method that would ordinarily result in such notice. *Brown v. Lethert*, 360 F.2d 560, 562 (8th Cir. 1966). The statute is satisfied as long as the notice of deficiency is mailed to the taxpayer's "last known address." *Tadros v. Commissioner*, *supra* at 91.

Petitioners have not convinced us as to when they received the notice of deficiency. At trial, petitioner said little about his relationship with Mr. Brenner and offered no explanation for Mr. Brenner's failure to deliver the certified letter he had accepted for petitioners to them. Similarly, we note that petitioners did not call petitioner Marilyn Tjossem as a witness to testify as to whether she had ever received the deficiency notice from Mr. Brenner. We also note that petitioners did not call as a witness the Postal Service employee who delivered their mail and delivered respondent's notice, obtaining Mr. Brenner's signature thereon. Finally, petitioner's December 18, 1990, letter to respondent shows that petitioner was aware that the September 17, 1990, requests for payment would have followed the issuance of a 90-day letter. Petitioners have failed to carry their burden of proving that they did not receive the deficiency notice because the U.S. Postal Service delivered it to Mr. Brenner.

Petitioners would not prevail here even if they had convinced us otherwise of the facts surrounding their receipt of the notice of deficiency. Petitioners cite *Estate of McKaig v. Commissioner*, 51 T.C. 331, 336 (1968); *Tangren v. Mihlbachler*, 522 F. Supp. 701, 703 (D. Colo. 1981); *Kennedy v. United States*, 403 F. Supp. 619 (W.D. Mich. 1975), affd. without published opinion 556 F.2d 581 (6th Cir. 1977), as providing an exception to the last known address rule of section 6212(b) when the U.S. Postal Service breaches its duty and misdelivers properly addressed mail to someone who is not an authorized agent and not at the address to which the mail is directed.

The cases cited by petitioners are distinguishable because in each of them respondent was on notice that the notice of deficiency was not delivered to petitioners and was returned by the post office to respondent. In addition, in those cases respondent's error in addressing the notice of deficiency contributed to the nondelivery of the deficiency notices.

Petitioners also rely on *Mulder v. Commissioner*, 855 F.2d 208, 212 (5th Cir. 1988), and *McPartlin v. Commissioner*, 653 F.2d 1185, 1191 (7th Cir. 1981), for the proposition that diversion of a deficiency notice by the U.S. Postal Service renders the notice invalid. In *Mulder* and *McPartlin*, respondent's file contained no return receipt for the deficiency notice sent to the taxpayers.

Petitioners' reliance on *Mulder* and *McPartlin* is misplaced. We interpret these cases as holding that the presumption of delivery of a properly addressed notice of deficiency sent by certified mail may be overcome when no return receipt is received by the sender.

Here, it was stipulated that respondent properly addressed the notice of deficiency to petitioners' last known address. Respondent received the return receipt and thus was not put on notice that the deficiency notice was not delivered to petitioners.

Respondent argued that petitioners knew in September 1990, or at the latest December 1990, that a deficiency in tax had been determined for their 1986 and 1987 tax years, yet they did not file a petition with this Court until April 1991. In light of the foregoing, we need not reach this issue.

It is not necessary that the taxpayer receive the notice of deficiency if the notice was, in fact, mailed to taxpayers' last known address, as it was here. Sec. 6212(b); *Jones v. United States*, 889 F.2d 1448, 1450 (5th Cir. 1989) (taxpayers failed to receive properly mailed deficiency notice); *Keado v. United States*, 853 F.2d 1209, 1211-1212 (5th Cir. 1988) (properly addressed notice of deficiency was not received by the taxpayers due to post office error); *Monge v. Commissioner*, 93 T.C. 22, 33 (1989).

We conclude and hold that respondent has met the requirements of section 6212(b) for mailing a notice of deficiency to petitioners at their last known address, notwithstanding petitioners' failure to receive the notice of deficiency due to misdelivery by the U.S. Postal Service. The petition was filed beyond the statutory 90-day period. Consequently, respondent's motion will be granted.

Accordingly,

DEC 23 1991

An appropriate order will be entered.

APPENDIX C

U.S. COURT OF APPEALS
FILED
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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 92-4257

GARY N. TJOSSEM and
MARILYN E. TJOSSEM,

Petitioners-Appellants,

versus

COMMISSIONER OF INTERNAL
REVENUE,

Respondent-Appellee.

Appeal from a Decision of the United
States Tax Court

(A Texas Case)

ON PETITION FOR REHEARING

(December 1, 1992)

Before KING, JOHNSON, and DUHE, JR., Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby denied.

ENTERED FOR THE COURT:

/s/ illegible

CLERKS NOTE
AND LOCAL
RULES 41 FOR STAY OF THE
MANDATE

DEC-3 1992

APPENDIX D

U.S. COURT OF APPEALS
FILED
OCT 30 1992
RICHARD E. WINDHORST,JR.
CLERK

UNITED STATES COURT OF APPEALS
for the Fifth Circuit

No. 92-4257

Gary N. Tjossem and Marilyn E. Tjossem,

Petitioners-Appellants,

VERSUS

Commissioner of Internal Revenue,

Respondent-Appellee.

Appeal from a Decision of the United States Tax Court
(7747 91)

Before KING, JOHNSON, AND DUHÉ, Circuit Judges.

PER CURIAM:[1]

Appellants, Gary N. Tjossem and Marilyn E. Tjossem, appeal the Tax Court's granting of the Commissioner's Motion to Dismiss for Lack of Jurisdiction. The court held that the Notice of Deficiency to the taxpayers was sufficient and that the taxpayers failed to timely file their petition with the Tax Court. We affirm.

Background

The Commissioner of Internal Revenue ("Commissioner"), Appellee, issued a Notice of Deficiency ("Notice") to Gary and Marilyn Tjossem, Appellants, for the tax years ended December 31, 1986 and December 31, 1987, respectively. The Notice, sent by certified mail, was correctly addressed to the Tjossems at 6131 Coral Ridge, Houston, Texas, their last known address. For unexplained reasons, the U.S. Postal Service delivered the Notice to Mr. R. O. Brenner, the Tjossems' neighbor, at 6134 Coral Ridge, Houston, Texas. The Tjossems contend that they never authorized Mr. Brenner to accept mail for them nor did they authorize the Postal Service to deliver their mail to Mr. Brenner.[2] The Tjossems allege that they never received the Notice because it was improperly delivered. They assert that such mishandling of the Notice by the Postal Service renders the Notice invalid.

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1. Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the Court has determined that this opinion should not be published.

2. Mr. Brenner is deceased and did not testify.

In April, 1991, the Tjossems petitioned the Tax Court for a redetermination of the deficiencies. The Commissioner moved to dismiss the petition for lack of jurisdiction because the petition was filed more than 90 days after the mailing date of the Notice as required under I.R.C. § 6212. The Tjossems filed a cross motion to dismiss on the ground that the Notice was invalid because the Commissioner had not established that the Notice was properly mailed and addressed in accordance with the requirements of I.R.C. § 6212. Following an evidentiary hearing, the Tax Court (Judge Colvin) dismissed the Tjossems' petition for lack of jurisdiction. The Tjossems appeal.[3]

Discussion

To maintain an action in the Tax Court, the Commissioner must issue a valid Notice and the taxpayer must file a petition in the Tax Court within 90 days after a valid Notice is mailed in order for the Tax Court to have jurisdiction to determine the validity of a deficiency. I.R.C. § 6213(a). Section 6212 details the requirements for issuing a valid Notice authorizing the Commissioner to send a Notice to a taxpayer by certified or registered mail. A Notice is valid even if it is not received.[4] The statute is satisfied if

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3. The Tjossems' argument that the Notice was stolen by Mr. Brenner was not raised in the Tax Court and therefore will not be considered on appeal.

4. *See Jones v. United States*, 889 F.2d 1448, 1450 (5th Cir. 1989); *Keado v. United States*, 853 F.2d 1209, 1211-12 (5th Cir. 1988); *Tadros v. Commissioner*, 763 F.2d 89, 91 (2nd Cir. 1985); *Luhring v. Glotzbach*, 304 F.2d 556, 558 (4th Cir. 1962); *Zenco Engineering Corp. v. Commissioner*, 75 T.C. 318, 321-22 (1980), *aff'd. without published opinion*, 673 F.2d 1332 (1981).

the Notice is properly mailed to the taxpayer's "last known address."[5]

The Tax Court held against the taxpayers on two grounds. First, the court held that the Tjossems failed to prove that they did not actually receive the Notice.[6]

Second, the court held that even if the taxpayers had proven the facts they alleged, that they would lose their legal argument. The court correctly distinguished this case from those cases which provide an exception to the "last known address" rule under § 6212(b). In those cases, the Commissioner was on notice of the failure of delivery and the Commissioner's error in addressing the Notice had contributed to the failure of delivery. In this case, the Commissioner had properly addressed the Notice, sent it certified mail, and had received the return receipt. Thus, the Commissioner was not put on notice of the failure to deliver. The court held that because the Commissioner properly mailed the Notice to the taxpayers' last known address that the Notice was valid. The taxpayers' failure to receive the Notice was held to be irrelevant and the court dismissed the Tjossems' claim for lack of jurisdiction. We agree and

AFFIRM.

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5. *McCarty v. United States*, 929 F.2d 1085, 1089 (5th Cir. 1991); *Tadros*, 763 F.2d at 91.

6. The only evidence offered by the Tjossems to prove that they had not received the Notice was the testimony of Mr. Tjossem.

APPENDIX E

18 U.S.C. §1702

Obstruction of correspondence

Whoever takes any letter, postal card, or package out of any post office or any authorized depository for mail matter, or from any letter or mail carrier, or which has been in any post office or authorized depository, or in the custody of any letter or mail carrier, before it has been delivered to the person to whom it was directed, with design to obstruct the correspondence, or to pry into the business or secrets of another, or opens, secretes, embezzles, or destroys the same, shall be fined not more than $2,000 or imprisoned not more than five years, or both.

(June 25, 1948, c. 645, 62 Stat. 778.)

APPENDIX F

18 U.S.C. § 1708

Theft or receipt of stolen mail matter generally

Whoever steals, takes, or abstracts, or by fraud or deception obtains, or attempts so to obtain, from or out of any mail, post office, or station thereof, letter box, mail receptacle, or any mail route or other authorized depository for mail matter, or from a letter or mail carrier, any letter, postal card, package, bag, or mail, or abstracts or removes from any such letter, package, bag, or mail, any article or thing contained therein, or secretes, embezzles, or destroys any such letter, postal card, package, bag, or mail, or any article or thing contained therein; or

Whoever steals, takes, or abstracts, or by fraud or deception obtains any letter, postal card, package, bag, or mail, or any article or thing contained therein which has been left for collection upon or adjacent to a collection box or other authorized depository of mail matter; or

Whoever buys, receives, or conceals, or unlawfully has in his possession, any letter, postal card, package, bag, or mail, or any article or thing contained therein, which has been so stolen, taken, embezzled, or abstracted, as herein described, knowing the same to have been stolen, taken, embezzled, or abstracted --

Shall be fined not more than $2,000 or imprisoned not more than five years, or both.

APPENDIX G

26 U.S.C. § 6212(b)(1)

§ 6212. Notice of deficiency

(b) Address for notice of deficiency. --

(1) Income and gift taxes and certain excise tax.-- In the absence of notice to the Secretary under section 6903 of the existence of a fiduciary relationship, notice of a deficiency in respect of a tax imposed by subtitle A, chapter 12, chapter 41, chapter 42, chapter 43, or chapter 44, if mailed to the taxpayer as his last known address, shall be sufficient for purposes of subtitle A, Chapter 12, chapter 41, chapter 42, chapter 43, chapter 44, and this chapter even if such taxpayer is deceased, or is under a legal disability, or, in the case of a corporation, has terminated its existence.

APPENDIX H

26 U.S.C. § 6213(a)

§ 6213. Restrictions applicable to deficiencies; petition to Tax Court

(a) Time for filing petition and restriction on assessment.-- Within 90 days, or 150 days if the notice is addressed to a person outside the United States, after the notice of deficiency authorized in section 6212 is mailed (not counting Saturday, Sunday, or a legal holiday in the District of Columbia as the last day, the taxpayer may file a petition with the Tax Court for a redetermination of the deficiency. Except as otherwise provided in section 6851, 6852 or 6861, no assessment of a deficiency in respect of any tax imposed by subtitle A, or B, chapter 41, 42, 43, or 44 and no levy or proceeding in court for its collection shall be made, begun, or prosecuted until such notice has been mailed to the taxpayer, nor until the expiration of such 90-day or 150-day period, as the case may be, nor, if a petition has been filed with the Tax Court, until the decision of the Tax Court has become final. Notwithstanding the provisions of section 7421(a), the making of such assessment or the beginning of such proceeding or levy during the time such prohibition is in force may be enjoined by a proceeding in the proper court, including the Tax Court. The Tax Court shall have no jurisdiction to enjoin any action or proceeding under this subsection unless a timely petition for a redetermination of the deficiency has been filed and then only in respect of the deficiency that is the subject of such petition.

APPENDIX I

UNITED STATES CONSTITUTION - AMENDMENT V

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.